

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	File No.: EB-02-CF-712
Mark A. Clay	)	NAL/Acct. No. 200332340003
Huntington, West Virginia	)	FRN 0005-3791-77

**MEMORANDUM OPINION AND ORDER**

**Adopted: January 25, 2007**

**Released: January 29, 2007**

By the Assistant Chief, Enforcement Bureau:

**I. INTRODUCTION**

1. In this *Memorandum Opinion and Order* (“*Order*”), we grant, to the extent indicated herein, the petition for reconsideration filed by Mark A. Clay (“Mr. Clay”). Mr. Clay seeks reconsideration of a *Memorandum Opinion and Order* (“*MO&O*”)<sup>1</sup> in which the Enforcement Bureau (“Bureau”) denied Mr. Clay’s previous petition for reconsideration of a Bureau *Forfeiture Order*,<sup>2</sup> which found Mr. Clay liable for a monetary forfeiture in the amount of one thousand dollars (\$1,000) for willful and repeated violation of Section 301 of the Communications Act of 1934, as amended (“Act”).<sup>3</sup> The noted violation involves Mr. Clay’s operation of an unlicensed FM broadcast station on the frequency 98.1 MHz in Huntington, West Virginia. For the reasons discussed below, we reduce the forfeiture amount to two hundred fifty dollars (\$250).

**II. BACKGROUND**

2. On January 29, 2003, the District Director of the Commission’s Columbia, Maryland Field Office (“Columbia Office”) issued a *Notice of Apparent Liability for Forfeiture* (“*NAL*”),<sup>4</sup> proposing a monetary forfeiture of ten thousand dollars (\$10,000) to Mr. Clay for apparent willful and repeated violation of Section 301 of the Act based on observations by the Columbia Office that Mr. Clay was operating an unlicensed FM broadcast station as referenced above. On June 16, 2004, the Bureau in finding Mr. Clay liable for willful and repeated violation of Section 301 of the Act, issued a *Forfeiture Order* reducing the \$10,000 forfeiture to \$1,000. Mr. Clay filed a petition for reconsideration of the *Forfeiture Order* on July 16, 2004, seeking a further reduction of the forfeiture amount. On June 24, 2005, the Bureau issued a *MO&O* denying Mr. Clay’s petition for reconsideration. Finding Mr. Clay’s arguments to be without merit, the Bureau declined to further reduce the forfeiture amount because Mr. Clay failed to provide documentation to support an inability to pay claim.

<sup>1</sup> *Mark A. Clay*, DA- 05-1709, 2005 WL 1787599 (Enf. Bur. released June 24, 2005)(“*MO&O*”).

<sup>2</sup> *Mark A. Clay*, 19 FCC Rcd 10500 (Enf. Bur. 2004)(“*Forfeiture Order*”).

<sup>3</sup> 47 U.S.C. § 301.

<sup>4</sup> *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200332340003 (Enf. Bur., Columbia Office released January 29, 2003).

3. In his petition Mr. Clay seeks dismissal of the forfeiture based on an inability to pay the forfeiture amount, and the fact that the equipment has been destroyed or sold. He has provided personal financial information to support his inability to pay claim.

### III. DISCUSSION

4. The forfeiture amount in this case was assessed in accordance with Section 503(b) of the Act,<sup>5</sup> Section 1.80 of the Rules,<sup>6</sup> and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* ("Forfeiture Policy Statement").<sup>7</sup> In examining Mr. Clay's petition, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.<sup>8</sup>

5. The disposal and sale of the equipment was previously discussed in the Bureau's *MO&O*,<sup>9</sup> and we find no reason to cancel the forfeiture based on Mr. Clay's disposal of the equipment.<sup>10</sup> We have, however, examined the financial information submitted with Mr. Clay's petition. In analyzing an inability to pay claim, the Commission generally has looked to gross revenues as a reasonable and appropriate yardstick in determining whether a licensee is able to pay the assessed forfeiture.<sup>11</sup> While we find that Mr. Clay willfully and repeatedly violated Section 301 of the Act, based upon his inability to pay, we conclude that pursuant to Section 503(b) of the Act and the *Forfeiture Policy Statement* that reduction of the \$1,000 forfeiture to \$250 is warranted.<sup>12</sup>

### IV. ORDERING CLAUSES

6. Accordingly, **IT IS ORDERED** that, pursuant to Section 405 of the Act<sup>13</sup> and Section 1.106 of the Rules,<sup>14</sup> Mark A. Clay's petition for reconsideration of the June 16, 2005 *Memorandum*

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<sup>5</sup> 47 U.S.C. § 503(b).

<sup>6</sup> 47 C.F.R. § 1.80.

<sup>7</sup> 12 FCC Rcd. 17087 (1997), *recon. denied*, 15 FCC Rcd. 303 (1999).

<sup>8</sup> 47 U.S.C. § 503(b)(2)(D).

<sup>9</sup> *MO&O* at note 3.

<sup>10</sup> See *AT&T Wireless Services, Inc.*, 17 FCC Rcd 21866, 21875 (2002); *Seawest Yacht Brokers*, 9 FCC Rcd 6099 (1994) (corrective action taken to comply with the rules is expected, and does not mitigate any prior forfeitures or violations); *Odino Joseph*, 18 FCC Rcd 16522, 16524 (Enf. Bur. 2003) (remedial action taken to terminate unauthorized broadcast operations is not a mitigating factor).

<sup>11</sup> See *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992).

<sup>12</sup> See *Local Long Distance, Inc.*, 16 FCC Rcd at 10025 (forfeiture not deemed excessive where it represented approximately 7.9 percent of the violator's gross revenues); *Hoosier Broadcasting Corp.*, 15 FCC Rcd 8640, 8641 (Enf. Bur. 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues); *Alpha Ambulance, Inc.*, FCC 04-19, 2, n.15 (February 5, 2004), *citing PJB Communications*, 7 FCC Rcd at 2089 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues).

<sup>13</sup> 47 U.S.C. § 405.

<sup>14</sup> 47 C.F.R. § 1.106.

*Opinion and Order* **IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED IN ALL OTHER RESPECTS.**

7. Payment of the forfeiture shall be made in the manner provided in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.<sup>15</sup> Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director – Financial Operations, 445 12<sup>th</sup> Street, SW, Room 1A625, Washington, D.C. 20554.<sup>16</sup>

8. **IT IS FURTHER ORDERED THAT** this *Order* shall be sent by regular mail and by certified mail, return receipt requested, to the address of record for Mark A. Clay.

**FEDERAL COMMUNICATIONS COMMISSION**

George R. Dillon  
Assistant Chief, Enforcement Bureau

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<sup>15</sup> 47 U.S.C. § 504(a).

<sup>16</sup> See 47 C.F.R. § 1.1914.